Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-962

SAM GREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SAM GREEN respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Opinion of the Court of Appeals (App. A) is reported at 518 F.2d 496. No opinion was rendered in the United States District Court for the Southern District of Florida.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 5, 1975 (App. B). A timely Petition for Rehearing was denied with Opinion on December 12, 1975 (App. C).

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 United States Code §1254(1).

QUESTIONS PRESENTED

I

MAY THE TRIAL COURT DENY AN AGGRIEVED PERSON AN EVIDENTIARY HEARING ON THE LEGALITY OF A PRIOR WIRETAP BY STRIKING ALL REFERENCES TO IT WHEN THE PRIOR WIRETAP WAS INCLUDED IN THE APPLICATION TO INTERCEPT THE WIRE COMMUNICATIONS INVOLVED HEREIN?

II

ASSUMING ARGUENDO IT WAS PROPER TO STRIKE ALL REFERENCE TO THE PRIOR WIRETAP, WAS THERE REMAINING PROBABLE CAUSE TO INSTALL A WIRETAP ON TELEPHONES AT THE RESIDENCE OF THE PETITIONER?

III

DO CONCLUSIONARY STATEMENTS OF THE INVESTIGATIVE OFFICER THAT OTHER INVESTIGATIVE PROCEDURES ARE INADEQUATE SATISFY THE REQUIREMENTS OF TITLE 18 UNITED STATES CODE §2518(1)(c)?

STATUTORY PROVISIONS INVOLVED

Title 18 United States Code

§2510

"As used in this chapter—
(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or

oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities

or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

* * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, . . .

STATEMENT

A United States Grand Jury for the Southern District of Florida, returned a multi-count Indictment charging the petitioner, SAM GREEN, GERALD HAY KILGORE, and one other with violations of Title 18 United States Code §1952. After a guilty verdict, Green was sentenced to the custody of the Attorney General for a period of two years.

The only evidence offered in support of interstate activities were recordings of telephone conversations between Green in Florida, and Kilgore in California. These recordings were a result of a wiretap installed at the residence of Green pursuant to a court order.

The application to intercept wire communications incorporated by reference a separate affidavit of a Special Agent of the Federal Bureau of Investigation.[1] Both included with specificity a full and complete statement concerning a prior and concurrent wiretap on the telephones of Kilgore wherein both Kilgore in California and Green in Florida were intercepted.

Prior to trial, Green filed a motion to suppress the intercepted telephone communications pursuant to the provisions of Title 18 United States Code §2518(10)(a).

Since the Kilgore tap furnished a basis for the order authorizing the interception of wire communications at Green's residence, the Trial Court originally granted Green and Kilgore an evidentiary hearing to determine whether the Green tap was a result of illegally obtained information from the Kilgore tap. Upon learning that the Kilgore tap consisted of 800 reels of tape recordings and would fill approximately 10,000 pages of transcription, the Court reversed itself, struck all references to the Kilgore tap from the application and the incorporated F.B.I. Agent's affidavit, and ruled that there was sufficient probable cause remaining for the Green wiretap.

REASONS FOR GRANTING THE WRIT

We believe that authorizing the striking of information about prior wiretaps is in conflict with *United States vs. Wac*, 6 Cir. 1974, 498 F.2d 1227, and *United States vs. Bellosi*, D.C.Cir. 1974, 501 F.2d 833, and contrary to the principles of *United States vs. Giordano*, 1974, 416 U.S. 505.

[1]Both documents were presented to the Court.

The Opinion of the Court of Appeals has misinterpreted the provisions of Title 18 United States Code §2518(1)(b) and §2518(1)(e) regarding the information that must be furnished in an application to intercept communications.

The Opinion of the Court of Appeals has an irreconcilable conflict within itself.

This Court should resolve to what extent an investigative officer should demonstrate the lack of availability of other investigative techniques before seeking authorization to intercept communications electronically.

ARGUMENT

I

MAY THE TRIAL COURT DENY AN AGGRIEVED PERSON AN EVIDENTIARY HEARING ON THE LEGALITY OF A PRIOR WIRETAP BY STRIKING ALL REFERENCES TO IT WHEN THE PRIOR WIRETAP WAS INCLUDED IN THE APPLICATION TO INTERCEPT THE WIRE COMMUNICATIONS INVOLVED HEREIN?

In compliance with the provisions of Title 18 United States Code §2518(1)(b) and §2518(1)(e), the application to intercept oral communications included the following information:

"No previous application has been made to any Judge for authorization to intercept or for ap-

proval of interception of wire or oral communications involving any of the same known persons, facilities or places specified herein. However, a previous application was made to the Honorable A. Andrew Houk, United States District Judge, Central District of California for authorization to intercept wire communications of Gerald Hay Kilgore to and from telephone 213-985-8885, and other telephones utilized by Gerald Hay Kilgore, located at the J. K. Sports Journal, 19548 Victory Boulevard, North Hollywood, California, in connection with the investigation of possible violations of 18 U.S.C. 1084 and 1952 by Gerald Hay Kilgore. On the basis of said application, an order was issued by Judge Houk on September 30, 1970, authorizing the Federal Bureau of Investigation to intercept wire communications of Gerald Hay Kilgore to or from the above-described telephones for a fifteen (15) day period from the date of the installation of the device. Upon termination of this interception an extension was applied for and on October 16, 1970 Judge David W. Williams, United States District Judge, Central District of California signed an order authorizing interception of communications of the above-mentioned persons over the above-mentioned telephones for an additional fifteen (15) days. Said interception, in compliance with the order, is continuing. Since the interception began, wire communications between persons using the above-described California telephone numbers and persons using the above-described telephone numbers subscribed to by Sonia Green and Bob Green were intercepted. The nature of these

intercepted wire communications is fully described in the attached affidavit of Special Agent William E. Colombell."

The incorporated affidavit of the Special Agent of the Federal Bureau of Investigation recited the following:

"15. On October 3, 1970, at 2:13 P.M. and October 11, 1970, at 1:37 P.M., telephone calls were placed to telephone number 305-944-2984 from the state of California. These calls, as well as other calls, were lawfully intercepted pursuant to a court order signed by Judge A. ANDREW HOUK, United States District Judge, Central District of California, on September 30, 1970, authorizing the Federal Bureau of Investigation to intercept wire communications of GERALD HAY KILGORE to and from telephones 213-985-8885 and 213-985-8983 and other telephones utilized by GERALD HAY KILGORE, which telephones are located at the J. K. Sports Journal, 19548 Victory Boulevard, North Hollywood, California, in connection with the investigation of possible violation of Title 18, United States Code, Sections 1084 and 1952. Transcripts of the above telephone calls were prepared by Special Agents of the Federal Bureau of Investigation. On October 16, 1970, Judge DAVID W. WILLIAMS, United States District Judge, Central District of California, signed an order extending the authorized period of interception of the communications of the above-named persons over the above-named facilities for an additional fifteen (15) days.

16. The following is an excerpt from the transcript for the call placed on October 3, 1970, in which football and baseball "line" information is exchanged:

Person Called: Hello.
Caller: Here ya go.
Person Called: All right, just a minute now, hold on. What ya gonna start with?
Caller: Start with game number sixty-eight.
Person Called: Sixty-eight; Go ahead.
Caller: Nine and a half.
Person Called: Right.
Caller: Six and a half and thirteen.
Person Called: Right.
Caller: Seven, twenty-three.
Person Called: Right.
Caller: Seven, pick and twenty-three.
Person Called: Right.
Caller: Four twice.
Person Called: Go ahead.
Caller: Six and a half and two. Fifteen four and ten. Five and two the Saints.
Person Called: Right.
Caller: Twelve, nine, eleven, twelve and a half.
Person Called: Right.
Caller: Cincinnati game tomorrow is a pick, Merritt against Walker.
Person Called: Merritt and Walker, just a minute; ah, Walker is a pick, right? What else did he give ya?
Caller: That's it, no series price yet.
Person Called: No series price?

Caller: No, do you have one?
Person Called: What about Baltimore; looks like Baltimore's in.
Caller: Baltimore's in. I don't know, (unintelligible)

17. During this conversation the parties discuss and furnish final scores on college football games played that day. The parties terminated their call with the following conversation:

Caller: That's all I got for finals.
Person Called: All right, now listen, don't forget to call me as late as you possibly can.
Caller: I will, I will.
Person Called: Ya didn't call me last night.
Caller: The hell I, ah I know, I didn't have to, you recall.
Person Called: Ah, all right, I'll wait for your call.
Caller: I'll, I'll call ya, Okay?
Person Called: All right.
Caller: Okay, buddy.

18. The following is an excerpt from the transcript for the the call placed on October 11, 1970 in which football "line" information is discussed and one of the parties, referred to as "SAM," complains that he is not getting line information fast enough:

Person Called: Hello.
Caller: Here ya go.

Person Called: Hey, why did ya take so long? I want to know.

Caller: I just now hung up, I just got it.

Person Called: I mean why does it take them so (obscene) long for this shit.

Caller: I don't know.

Person Called: It's ridiculous.

Caller: Well, I wouldn't call and scream at him today.

Person Called: Go ahead.

Caller: Very, very bad; Notre Dame.

Person Called: I've been here all (obscene); now I've got to spend a (obscene) week in the room, with this shit — let's go.

Caller: Don't scream at me about it, SAM.

Person Called: I'm gonna call, I'm gonna get a hold of him.

Caller: Don't do it tonight, listen to what I tell you.

Person Called: Why?

Caller: It's bad.

Person Called: Okay.

Caller: It's real bad, Notre.

Person Called: (inaudible) I'm being an idiot here; — ya know, ya wanta know somethin', there's a line out already a long time ago.

Caller: Notre Dame, 13; Dartmouth, 27.

Person Called: Dartmouth 27.

Caller: Yeah.

Person Called: Let me close the door a minute. (background noise) Yeah, go ahead.

Caller: Dartmouth, 27; South Carolina 15, one five.

Person Called: Right.

Caller: Duke, 6½.

Person Called: Right.

Caller: Ohio State, 25.

Person Called: Right.

Caller: Skip; West Virginia 6½.

Person Called: Right.

19. During this conversation, the parties relate how one of their associates was hurt bad with heavy gambling losses on football and baseball games and further discuss how the bookmakers are winning all the money:

Caller: Let me explain something to you.

Person Called: Yeah.

Caller: I know that he is feuding quite a bit with the other fellow.

Person Called: They are?

Caller: Quite a bit, — a great deal they're feuding, I know that it's real, real, real bad this week, STANLEY I mean, and you never heard me say bad.

Person Called: Well, how come?

Person Called: Playin, layin, even relayed, parlayed and you know, it's bad for him, I know.

Person Called: Who's gettin the best of it?

Caller: Who's, he's, he's gettin hurt.

Person Called: He is huh?

Caller: Yeah, got hurt bad.

Person Called: I know that one day, Friday, I think it was, or something, he got hurt real bad.

Caller: Friday? With what?
Person Called: I don't know with what; I think with ah, with baseball or somethin. I don't know.
Caller: Oh, ah with the foots yesterday and today very very bad for him.
Person Called: How the hell is this, the B Ms are all for cryin.
Caller: Well I don't know, they're, they're, they're lyin to you, believe me when I tell you they're lyin to you, they ain't got no reason to cry, no reason, they won all the money in the world, the B M's.
Person Called: Jesus I don't know, alright.
Caller: Don't let em Bullshit you, I won't even listen to these (obscene) when they tell me that.
Person Called: Yeah
Caller: But I know that it's it's just treacherous, treacherous.
Person Called: Ah listen.
Caller: Yeah.
Person Called: What's with the baseball.
Caller: Oh yeah (inaudible) Mc Nally a dollar and a half over Cloninger.
Person Called: Mc Nally, one five zero.
Caller: Over Cloninger.
Person Called: Cloninger.
Caller: The series 7 to one, one to four.
Person Called: Ah, one to seven, four to one.
Caller: Right, 1 to 7, 4 to 1.
Person Called: 1 to 7 and 4 to 1, OK, ya got any scores?

Caller: Yeah, ah Giants 30 Philly 23.
Person Called: Yeah.

20. The parties then discussed final scores on recent professional football games after which the parties terminated the call.

• • •

22. All wire communications to and from the above listed telephone numbers are currently being intercepted by Special Agents of the Federal Bureau of Investigation pursuant to the Federal Court Order previously referred to in paragraph fifteen of this affidavit."

Rather than grant the petitioner a hearing on the legality of the Kilgore tap, the Court struck the foregoing quoted portions of the application and incorporated affidavit.

In discussing that procedure, the Court of Appeals created an irreconcilable conflict. On the one hand, in approving that action, it said:

"After the trial judge struck references to a prior wiretap from both the application and the affidavit, he still found that sufficient probable cause remained. . . ."

In the same Opinion, the Court said:

"Under 18 USC ¶2518(1)(e) the government's application must give 'a full and complete statement of the facts concerning all previous applications known to the individual authorizing and

making the application [to intercept] . . . communications involving any of the same persons. . . .'"

The Court never articulated how it could sanction the striking from the application that which it later said "must" be included.

In *United States vs. Giordano*, 1974, 416 U.S. 505, this Court ruled that an application for an extension under the provisions of Title 18 United States Code §2518(1)(f) must contain the results of the original application because it was "essential in law" to support the extension.

In *United States vs. Wac*, 6 Cir. 1974, 498 F.2d 1227, there was an approved application to intercept wire communications. Immediately upon the termination of that tap, there was a *new* application (as opposed to an extension) to intercept communications of not only some of the same parties, but additional parties and facilities. The first application was ruled illegal under *Giordano*. The Court of Appeals, in ordering the suppression of the results of the second application, stated:

"Though the second application in this case was not literally for an extension order since it added a new suspect and several new telephones, it was filed immediately upon expiration of the first order and related primarily to the same persons and locations. Not being an application for an extension, it was not controlled by §2518(1)(f). In this respect the present case differs from *Giordano* and it cannot be said that the results of the conversations overheard pursuant to the first order were 'essential in law' to issuance of the second order

Nevertheless, a significant portion of the supporting affidavit filed with the second application consisted of transcripts of conversations overheard and lists of calls monitored pursuant to the first order. This information was relied upon by the applicant and presumably considered by the district judge who granted the second order. While not essential in law under the circumstances of this case, we deem the results of the first order to be 'essential in fact' to the granting of the second order."

Since §2518(1) requires that the application include a full and complete statement of facts relied upon by the applicant *and* a full and complete statement of facts concerning wiretap activities of the same persons, the stricken portions were essential both in fact and in law.[2]

Green, being an aggrieved party under the provisions of Title 18 United States Code §2510(1), was entitled to a full adversary hearing on his motion to suppress. *Alderman vs. United States*, 1969, 394 U.S. 165.

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[2]See *United States vs. Bellosi*, D.C.Cir. 1974, 501 F.2d 833.

II

ASSUMING ARGUENDO IT WAS PROPER TO STRIKE ALL REFERENCE TO THE PRIOR WIRETAP, WAS THERE REMAINING PROBABLE CAUSE TO INSTALL A WIRETAP ON TELEPHONES AT THE RESIDENCE OF THE PETITIONER?

Title 18 United States Code §2518(1)(b) requires that there must be a demonstration of belief as to why *particular telephone facilities* are to be intercepted.

If all references to the Kilgore tap are stricken from the application and affidavit, there was no probable cause to believe that the telephone facilities at Green's *residence* were being used for illegal activities.

Summarizing and paraphrasing the affidavit (without reference to the Kilgore tap), it says the affiant had been an F.B.I. Agent and for sixteen months engaged exclusively in investigation of gambling activities; that he believes that interstate facilities are necessary for handicappers; that during August, September and October, 1970, informers engaged in gambling told the Agents that Green was a handicapper and furnished line information to local bookmakers; that in August and September, 1970, F.B.I. Agents observed Green in various *public telephone booths* and on several of these occasions overheard Green giving and receiving line information; that between May, 1970, and July 6, 1970, (three and one-half months before the affidavit), there were 110 telephone calls[3] from

[3]Without reference to the Kilgore tap, only the calling telephone number, the receiving telephone number and the quantity of calls would be known.

a California telephone to the telephone at the Green residence.

From these facts it would appear at most that at one time (May through July 6, 1970) there was an unusual number of long distance telephone calls from California to Green's residence which may have referred to gambling. But that information was attenuated by the intervening surveillance in August and September, 1970, from which one could only infer that Green had shifted his gambling activities from his residence to public telephones.

Therefore, the excised application would not show probable cause to believe that in October, 1970, the facilities at Green's residence were being used for the commission of an offense.

The foregoing demonstrates the correctness of the argument presented under Question I herein — that the prosecutor, investigator and the Court necessarily relied upon the information furnished by the Kilgore tap.

III

DO CONCLUSIONARY STATEMENTS OF THE INVESTIGATIVE OFFICER THAT OTHER INVESTIGATIVE PROCEDURES ARE INADEQUATE SATISFY THE REQUIREMENTS OF TITLE 18 UNITED STATES CODE §2518(1)(c)?

In an effort to comply with the requirements of Title 18 United States Code §2518(1)(c), the incorporated affidavit states as follows:

"My experience and the experience of other Agents has shown that even though gambling "customers" are identified, they are unwilling to furnish information to law enforcement agents or officials inquiring into gambling activities. This is even more true when the "customer" is a professional gambler himself and is requested to give information concerning a gambling operation. Experience has further established that even though telephone toll records are available, which indicate a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would succeed only to a limited degree in establishing that SAMUEL GREEN is involved in gambling activities on the telephone. Furthermore, such investigative techniques as physical surveillance and examination of the records obtainable on SAMUEL GREEN contain little probability of success in securing prosecutable evidence. Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigations of gambling activities, normal investigative procedures reasonably appear to be unlikely to succeed in establishing that SAMUEL GREEN is involved in gambling activities on the telephone in violation of Federal laws. My experience and the experience of other Agents have shown that gambling raids and searches of gamblers and

their gambling establishments have not in the past resulted in the gathering of physical or other evidence to prove all elements of the offenses. I have found that through my experience and the experience of other Special Agents who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers, immediately prior to or during a physical search, sometimes destroy these records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish the interstate elements of Federal offenses, because such records are difficult to interpret and many times are of little or no significance without further knowledge of the gambler's activity and its interstate nature. Therefore, the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violations of these statutes."

Although raised below, the Court of Appeals did not comment upon the sufficiency of the foregoing.

In *United States vs. Kalustian*, 9 Cir., Slip Opinion 74-3314, decided August 4, 1975, petition for rehearing filed October 14, 1975, the Court held that a similar statement was insufficient to comply with the law, and said:

"The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in na-

ture or degree from any other gambling case. In effect the Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance."

This Court in *United States vs. Giordano*, 1974, 416 U.S. 505, said:

"Congress legislated in considerable detail in providing for applications and orders authorizing wire tapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state that and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

In analyzing the supporting affidavit, it is patent that with a trifle investigative ingenuity and relatively little effort, the Los Angeles F.B.I. Agents who were already intercepting Kilgore's telephone calls to Green could have coordinated time and information with the Agents who were surveilling and overhearing Green in Miami. With that, there was every reasonable likelihood of a successful and untainted prosecution without wiretapping Green's home.

Instead, the investigative agents and the prosecutors did that which the opponents to wiretapping feared—the use of electronic surveillance as a routine substitute for conventional investigative techniques.

CONCLUSION

Petitioner respectfully submits that a review of the record will indicate that this Petition for Writ of Certiorari should be granted and that the Judgment of the Court of Appeals affirming the Judgment of the District Court should be set aside and the Judgment of conviction reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari have been furnished, Air Mail, Postage Prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this 7 day of January, 1976.

E. DAVID ROSEN

APPENDIX

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

No. 71-3559

UNITED STATES of America,
Plaintiff-Appellee,
v.
Gerald Hay KILGORE and Sam Green,
Defendants-Appellants.

Sept. 2, 1975.

Defendants were convicted before the United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, J., of conspiring to violate and of violating statute prohibiting use of a facility in interstate commerce for gambling activity, and they appealed. The Court of Appeals, Goldberg, Circuit Judge, held that evidence that the Attorney General himself authorized wiretap application was sufficient, that failure to list codefendant in application as a person whose communications were to be intercepted did not invalidate the wiretap, and that application complied with statute requiring wiretap application to state facts concerning previous applications to intercept communications involving any of same persons.

Affirmed.

1. Telecommunications — 496

In absence of a statutory mandate, ordinary rules of evidence apply in resolving evidentiary question which

arises when identity of person authorizing application for wiretap is contested. 18 U.S.C.A. §§ 2516, 2516(1).

2. Criminal Law — 444

Testimony of executive assistant to Attorney General as to genuineness of Attorney General's initials on memorandum designating an assistant attorney general to exercise power to authorize application for wiretap was sufficient to admit the memorandum to prove that the Attorney General authorized the application. 18 U.S.C.A. §§ 2516, 2516(1).

3. Criminal Law — 444

Executive assistant to Attorney General was competent to prove fact that the Attorney General initialed authorization for application for a wiretap. 18 U.S.C.A. §§ 2516, 2516(1).

4. Criminal Law — 444

Memorandum which designated an assistant attorney general to exercise power to authorize application for wiretap and which was allegedly initialed by the Attorney General, and affidavit of executive assistant to Attorney General stating that the Attorney General approved request to make the application and that the initials on the memorandum were those of the Attorney General were sufficient to establish that the Attorney General himself authorized the application so as to comply with statute, and an affidavit from the Attorney General himself was not required. 18 U.S.C.A. §§ 2516, 2516(1).

5. Telecommunications — 496

Even though Government might have had probable cause to name codefendant in wiretap application which mentioned defendant and "others yet unkown" as persons whose communications were to be intercepted, failure to do so did not invalidate the wiretap, where defendants were given inventory of intercepted conversations, could listen to the tapes and were given transcripts of them, where there was no indication of bad faith by Government in its application, and where the application and affidavit specifically delineated what information the Government expected to gather from the wiretap. 18 U.S.C.A. §§ 2516, 2518(1)(b)(iv).

6. Telecommunications — 496

Statute requiring wiretap application to state facts concerning previous applications to intercept communications involving any of same persons does not require a fully detailed statement about the contents of the interception, although a judge may require such additional facts before granting an order. 18 U.S.C.A. § 2518(1)(e).

7. Telecommunications — 496

Under statute requiring wiretap application to state facts concerning previous applications to intercept communications involving any of same persons, application which indicated that Government had previously tapped codefendant's telephones in California and that this interception had produced evidence of conversations between codefendant and defendant was not inadequate on ground that it did not sufficiently detail contents of the California

interception and did not mention a Georgia interception where statement about California interception sufficiently detailed the circumstances of that wiretap, and Georgia application had been made in reference to a third party. 18 U.S.C.A. § 2518(1)(e).

Appeals from the United States District Court for the Southern District of Florida.

Before RIVES, GEWIN and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

Kilgore and Green were convicted by a jury of conspiring to violate and of violating 18 U.S.C. § 1952, which prohibits the use of a facility in interstate commerce for gambling activity. The evidence was that Kilgore had transmitted information by telephone from California to Green in Florida. Green then transmitted this information to local bookmakers. The evidence was presented at trial in the form of recordings of the conversations which had been intercepted by federal agents. The defendants had moved to suppress these recordings, alleging that there were illegalities committed in the application for the wiretap order and in its execution. After the trial judge struck references to a prior wiretap from both the application and the affidavit, he still found that sufficient probable cause remained in the application and supporting affidavit to uphold the order allowing the wiretap, that the application was sufficient in its other respects and that the wiretap had been carried out legally. On this basis he refused to suppress the evidence gathered through the interception.

Kilgore and Green appeal their conviction, alleging that their trial was illegally infected by the trial judge's refusal to suppress the recordings. We believe that the trial judge made the right decision and therefore affirm the conviction. We will limit our discussion to three issues raised by appellants, since the other points they raise are without merit.

A. *Authorization for the Application for a Wiretap:*

In *United States v. Giordano*, 1974, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341, and *United States v. Chavez*, 1974, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380, the Supreme Court said that *only* the United States Attorney General or an Assistant Attorney General may authorize a federal agent to apply to a judge for a wiretap order in order to comply with 18 U.S.C. § 2516(1), which provides that the Attorney General or an Assistant may give the authorization. A memorandum submitted by the government, allegedly initialled by then Attorney General John Mitchell, indicates compliance with this requirement in the instant case. The memorandum to an Assistant Attorney General reads in part: "Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise that power [to authorize an application] for the purpose of authorizing William L. McCulley to make the above-described application." The Government also submitted an affidavit from Sol. Lindenbaum, the Executive Assistant to the former Attorney General, in which he says that Mitchell approved the request to make application for an interception and that the initials on the memorandum are those of Mitchell.

The appellants contend, however, that these pieces of evidence are not enough to show compliance with 18 U.S.C. § 2516(1). They try to distinguish *Chavez* on the ground that Mitchell himself submitted an affidavit there, which indicated that he had approved the application whereas here we only have an affidavit from his assistant.

[1] But the statute does not require that the At torney General both actually approve the application *and* provide the courtroom evidence that he gave the approval. Resolution of the evidentiary question which arises when the identity of the authorizing agent is contested is not covered by statutory guidelines. In the absence of a statutory mandate ordinary rules of evidence apply.

[2] It is clear that under traditional rules of evidence the testimony of Lindenbaum as to the genuineness of Mitchell's initials is sufficient to admit the Mitchell memorandum to prove that the Attorney General authorized the application:

> [I]t is generally held that anyone familiar with the handwriting of a given person may supply authenticating testimony in the form of his opinion that a writing or signature is in the handwriting of that person. Adequate familiarity may be present if the witness has seen the person write, or if he has seen writings *purporting* to be those of the person in question under circumstances indicating their genuineness. Examples of the latter situation include instances where the witness has . . . been present in an office or other place where

> genuine writings of a particular person in the ordinary course of business would naturally be seen.

McCormick on Evidence § 221 (2 ed. 1973). *See also* Federal Rule of Evidence 901(b)(2); *Paccon, Inc. v. United States*, 1968, 399 F.2d 162, 185 Ct.Cl. 24.

[3] Lindenbaum, by his status as Executive Assistant to the Attorney General established a prima facie case of familiarity with documents that the Attorney General would have initialled. His reliability was not contested by the appellants. Thus he is competent to prove the fact that Mitchell initialled the authorization. While here the verification came by way of affidavit and not direct testimony, the appellants made no objection to that procedure below.

[4] We therefore believe that the evidence that Mitchell himself authorized the application was sufficient and that the trial judge did not have to suppress the wiretap results on this basis. We note too that the same result has been reached by two other Circuits in which the evidence presented was an authorization purportedly signed by Mitchell together with a verifying affidavit from Lindenbaum. *See United States v. Brick*, 8 Cir. 1974, 502 F.2d 219; *United States v. Martinez*, 6 Cir. 1974, 498 F.2d 464.

B. *Identification of Suspect Parties in the Application:*

Appellants contend that the application to the judge for a wiretap order was deficient in that 18 U.S.C. § 2518(1)(b)(iv) was violated. That section requires that the application supply "the identity of the person, if known, committing the offense and whose communications

are to be intercepted," and also says "[e]ach order authorizing or approving the interception of any wire or oral communication shall specify—(a) the identity of the person, if known, whose communications are to be intercepted." In the present case, paragraph 3 of the application reads: "This application seeks authorization to intercept wire communications of Samuel Green and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code . . .". The appellants contend that the Government suspected that it would be intercepting communications from Kilgore but only mentioned Green and "others yet unknown".

The question of whether suspected parties aside from those whose communications are sure to be intercepted must be identified has been considered by this Court, sitting en banc. We have decided that the failure to name such an intercepted party would not invalidate the wiretap where the intercepted party was not prejudiced by the failure to be so named. In *United States v. Doolittle*, 5 Cir. 1975, 507 F.2d 1368, aff'd en banc, we said:

The wiretap authorization referred to "Billy Cecil Doolittle and others as yet unknown." Anderson and Baxter contend that the Government had reasonable cause to believe that their conversations would be intercepted. Relying on certain language in the Supreme Court's opinion in [*United States v. Kahn*, 1974, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225] they argue that, not being "unknown," they should have been named in the authorization. They contend that since they were not named, the wiretap order was illegal as to their conversations. The same argument could be made for Sanders. We reject this argument. The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization. The Government contends that its agents had personal knowledge, as opposed to information, to support probable cause as to illegal activity only of Doolittle, the co-owner of the Sportsman's Club, the establishment wherein the telephones were located and to which the telephone bills were sent. All defendants received an inventory of the intercepted conversations, were allowed to listen to the tapes and received transcripts of the conversations prior to use against them at trial, as if they had been named in the order. Most of the conversations of each defendant were with Doolittle, the person named in the order. There is no indication of bad faith or attempted subterfuge by the Government in its wiretape application. The application and affidavit delineated specifically the information expected to be gathered from the tap. We hold there was substantial compliance with the requirements of the Act, and that the failure to name other defendants does not render the evidence obtained as to them inadmissible under 18 U.S.C.A. § 2518(10) (a).[1]
507 F.2d at 1371-72 (footnote added).

[5] Here, too, defendants were given an inventory of intercepted conversations, could listen to the tapes and were given transcripts of them. In the recorded conversations at issue, Kilgore spoke to Green, who was named in the wiretap order. There is no indication of bad faith by the Government in its application. The Government here may have had probable cause to name Kilgore in the application, but the Government had probable cause as to the unnamed defendants in *Doolittle*—though by informa-

[1]Section 2518(1) (a) is the section which gives standing to a party claiming to be aggrieved to challenge alleged violations on the previous statutory sections, including § 2518(1) (b) (iv).

tion rather than personal knowledge—and yet there we upheld an application which did not mention these other defendants. Finally, the application and the affidavit specifically delineated what information the Government expected to gather from the wiretap. This issue therefore falls squarely in the shadow of the resolution in *Doolittle* and provides no grounds for reversal.

C. *Identification of Previous Wiretaps in the Application:*

[6, 7] Under 18 U.S.C. § 2518(1)(e) the government's application must give "a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application [to intercept] . . . communications involving any of the same persons . . .". In the present case the application indicated that the Government had previously tapped Kilgore's telephones in California and that this interception had produced evidence of conversations between Kilgore and Green. Appellants contend that the application did not sufficiently detail the contents of the California interception and did not mention at all a Georgia interception in which conversations between a third party and Kilgore had been picked up. The short answer to this complaint is that the statute does not require what the appellants say is lacking. The application must give a statement of the facts about all previous applications involving the same parties. Here the statement about the California interception sufficiently detailed the circumstances of that wiretap and disclosed that conversations with Green were overheard. The statute does not require a fully detailed statement about the contents of the interception although, of course, a judge may require such additional facts before granting

an order. There was no statement about the Georgia interception, but that interception only peripherally involved Kilgore. The Georgia application was made in reference to a third party without cause to believe Kilgore would also be overheard. During the course of intercepting that party's communications, agents heard some of his conversations with Kilgore. In the Georgia application the Government did not apply to intercept communications of the same persons—rather it applied to intercept conversations of a third party.

The conviction is therefore affirmed.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 71-3559

D. C. Docket No. 71-376-CR-CA
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

GERALD HAY KILGORE and SAM GREEN,
Defendants-Appellants,

Appeals from the United States District Court for the Southern District of Florida

Before RIVES, GEWIN and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 2, 1975

Issued as Mandate:

APPENDIX C

United States Court of Appeals,
Fifth Circuit.

No. 71-3559.

UNITED STATES of America,
Plaintiff-Appellee,
v.

Gerald Hay KILGORE and Sam Green,
Defendants-Appellants.

Dec. 12, 1975.

Defendants' convictions in the United States District Court for the Southern District of Florida, C. Clyde Atkins, J., were affirmed by the Court of Appeals, 518 F.2d 496, and defendants filed petition for rehearing. The Court of Appeals held that the Government's failure to identify one defendant in an application for electronic surveillance of the other defendant was not done in bad faith and did not prejudice defendant; and that the district court was not clearly erroneous in concluding that defendant received an inventory of the surveillance conducted in time prior to trial.

Petitions denied.

1. Telecommunications — 493

Even if defendant's conversations had previously been monitored in unlawful electronic surveillance of codefend-

ant, defendant was not thereby immunized from future electronic surveillance.

2. Criminal Law — 394.3
Telecommunications — 496

Government's failure to identify in electronic surveillance application person other than individual who was target of criminal investigation, despite fact that Government knew that that person's conversations would likely be intercepted, was not evidence of Government's bad faith requiring suppression of intercepted conversations as against that person, in view of fact that government attorney believed in good faith that such identification was not statutorily required. 18 U.S.C.A. § 2518.

3. Telecommunications — 496

Where person other than defendant was target of electronic surveillance application and defendant's conversations would have been overheard no matter how much judge who approved application minimized surveillance, Government's failure to name defendant in electronic surveillance application, in order to allow judge to consider whether surveillance of defendant was warranted in light of prior surveillance of which defendant was target, did not prejudice defendant, particularly in view of good faith doubt which might have existed with regard to previous taps on defendant which could have caused judge to approve yet another tap on him. 18 U.S.C.A. § 2518.

4. Telecommunications — 493

Under Omnibus Crime Control and Safe Streets Act of 1968, requirement that electronic surveillance be "necessary" refers not to the person whose conversations are to be intercepted, but rather to facts which make wiretapping necessary because of the nature of the particular crime involved. 18 U.S.C.A. § 2518(1)(c), (3)(c).

5. Criminal Law — 1158(2)

District court was not clearly erroneous in concluding that defendant received inventory of electronic surveillance to which he was party in time prior to trial. 18 U.S.C.A. § 2518.

Appeals from the United States District Court for the Southern District of Florida.

On Petitions for Rehearing and Petitions for Rehearing En Banc

(Opinion, Sept. 2, 1975, 5 Cir., 1975, 518 F.2d 496)

Before RIVES, GEWIN and GOLDBERG, Circuit Judges.

PER CURIAM:

[1] Both Kilgore and Green have filed petitions for rehearing, urging this Court to reconsider its affirmance of their convictions. We find nothing in Green's petition that would require a different result, nor does Kilgore's petition disturb our holding that the electronic surveillance

of Green's telephone was legal.[1] Kilgore raises several points that merit discussion, however, with regard to the admissibility of the evidence from the Green tap against him.

Two questions are presented here for our reconsideration: whether the district court gave an adequate evidentiary hearing on the question of the Government's alleged bad faith in not naming Kilgore in the Florida application, and whether Kilgore was prejudiced in any way by the Government's failure to name him. Unless Kilgore can show either bad faith or prejudice, his claims are foreclosed by our decision in *United States v. Doolittle*, 5 Cir., (en banc) 1975 518, F.2d 500 *affirming* 507 F.2d 1368. In *Doolittle*, there was substantial compliance with the inventory provisions of section 2518(9), no demonstrated prejudice to the defendants and no indication of bad faith on the Government's part. Under those circumstances, the fact that the wiretap authorization did not name the defendants, even though they were actually known to the Government, did not require suppression of the evidence gathered in the tap against them.[2] Thus, constrained as we are to follow the law of this Circuit, Kilgore must show that he is not within *Doolittle* before we would be able to grant him relief.

[1]We would like to make one point clear at the outset. Even if the Government had conducted illegal wiretaps on Kilgore in the past, Green would not be immunized from surveillance. If Green could take advantage of Kilgore's past experiences, the Government would effectively be precluded from investigating anyone who had been tapped before. We cannot believe that Congress intended this result. Thus, the greatest relief to which Kilgore would be entitled would be suppression of the evidence from the Green tap.

[2]*But see United States v. Donovan*, 6 Cir. 1975, 513 F.2d 337, petition for cert. filed, 44 U.S.L.W. 3164 (U.S. Sept. 30, 1975) (No. 75-212); *United States v. Bernstein*, 4 Cir. 1975, 509 F.2d 996, petition for cert. filed, 43 U.S.L.W. 3637 (U.S. May 27, 1975) (No. 74-1486).

Some additional facts are necessary to place our consideration of Kilgore's allegations in perspective. As our first opinion indicated, the Florida application to tap Green's telephone named only Green and "others yet unknown" in paragraph 3, which listed the persons whom the Government sought to intercept. Paragraph 5 represented that no previous applications had been filed to intercept any of the "known persons," communications—in other words, Green's. However, paragraph 5 went on to reveal that a previous application had been made to tap Kilgore's telephone in California, and that Green had been intercepted pursuant to that authorization. Nowhere did the application mention one prior Georgia wiretap and several prior California wiretaps in which Kilgore had been overheard. Kilgore now alleges that the Government's failure to name him in its Florida application for a tap on Green constituted bad faith on its part and operated to his prejudice. According to his allegations, the Government's motive in failing to name him was to avoid the necessity of revealing the prior wiretaps that involved him. Had these taps been disclosed, he argues, the judge who passed on the Florida application would have found it unnecessary as to him, both as an evidence-gathering mechanism and in terms of the statute's minimization directive. Furthermore, Kilgore argues that the prior California wiretap mentioned in the Florida application was illegal and that evidence from this illegal tap tainted the Florida application.

Recognizing the fact that Kilgore's allegations raised serious questions about the Florida tap, the district court ordered an evidentiary hearing on its validity in connection with Kilgore's motion to suppress. He refused to include within the scope of this hearing any consideration of the prior wiretaps on Kilgore. At the hearing, he acknowledged that some question existed about the legality of the California tap. As a cautionary measure, therefore, he struck all references to the California tap that went to the question of probable cause to tap Green. On the basis of the remaining information, he decided that sufficient probable cause still existed to support the tap on Green's telephone.[3] Defendants' challenge to this finding is without merit. Thus, after the district court's curative action, the Florida application was valid on its face. Unless the Government had procured it in bad faith, or unless Kilgore was prejudiced by the omission of his name, *Doolittle* would support the court's denial of the motion to suppress. The narrow question before us is whether the evidentiary hearing was sufficient to answer these questions, or whether we should remand this case for further proceedings.[4]

[2] 1. *Was the Government in bad faith when it did not name Kilgore?* The first question we must meet is

[3]*United States v. Giordano*, 1974, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341, does not disapprove this procedure. *Giordano* holds that a judge may not disregard the results of a tainted original tap when he is considering the validity of an *extension*, since that procedure would be a direct violation of 18 U.S.C. § 2518(1)(f). However, we agree with Justice Powell's characterization of the majority opinion where he states that it casts no doubt on the proposition that the independent source rule is fully applicable to original orders. See 416 U.S. at 517 n. 7, 94 S.Ct. at 1827 n. 7, 40 L.Ed.2d at 378 n. 7.

[4]We note that since the court did not have the benefit of our decision in *Doolittle*, the issues were not framed as precisely as they might have been.

that of the Government's motive in not naming Kilgore in its application. From a reading of the record at the hearing on the motion to suppress, we see that the court did consider this question. The testimony of the Government's attorney who prepared the application frankly reflects his belief that it was unnecessary to name Kilgore for a surveillance whose purpose was primarily to intercept Green. In cross-examination, Kilgore's attorney clearly pointed out the statutory requirement of naming the persons whose communications were to be intercepted. Since the district court decided to deny the motion to suppress, he must have found implicitly that the Government was not in bad faith when it omitted Kilgore's name. Surely if he had agreed that the Government was deliberately disobeying the statute, he would have delved further into the question.[5] Thus the legality of the Florida application was not tainted by bad faith in failing to name Kilgore, and the first premise of *Doolittle* is satisfied.

[3, 4] 2. *Was Kilgore prejudiced by the absence of his name?* The second prerequisite which must be met before we can apply *Doolittle* to this situation is the lack of prejudice to Kilgore. The question is this: Would the district judge who approved the Florida application have placed any additional limitations on the use of the evidence or on the surveillance conducted if Kilgore's name and the prior wiretaps had been disclosed? We think the answer to this question must be no, regardless of the details of the prior taps involving Kilgore. First, disclosure

[5]We note that a question which later found the Fourth and Sixth Circuits on one side and the Fifth on the other—that is, who must be named in an application—cannot be said to be so simple that the Government was in bad faith to adopt one interpretation of the statute over another. Furthermore, we may not disturb a credibility finding such as this unless it is clearly erroneous.

of Kilgore's name would not have affected the existence of the tap on Green, for as the Government stated, the tap was necessary for their investigation of Green. Kilgore argues that the Florida tap was not "necessary" for him; however, we think that the necessity requirement of section 2518(1)(c) and (3)(c) refers to the technique used, which relates in turn to the nature of the crime. His main point, then, is that the statute's requirement that electronic surveillance be minimized was violated. The rationale behind this requirement dictates that the Government agents conducting the surveillance not listen to conversations that do not relate to the criminal activity that is the focus of the investigation. It also requires minimization of the number of days or weeks of surveillance.[6]

Here, the agents literally could not have listened to Green's conversations related to the criminal activity without also listening to Kilgore. Thus, no matter how much the approving judge minimized the surveillance, Kilgore would have been overheard. Additionally, some good faith doubt may have existed with regard to the previous taps on Kilgore which would have caused the judge to approve yet another tap on him. Finally, this was not a case where the tap on Green was just an underhanded way to tap Kilgore; witnesses testified, and the district court found, that Green was the primary target of this tap. We conclude from all the circumstances that Kilgore was not prejudiced by the omission of his name from the Florida application.

[6]The legislative history indicates that Congress wanted to insure that the showing of probable cause would not become stale because of governmental delay. *See* S.Rep.No. 1097, 90th Cong., 2d Sess. (1968) (1968 U.S. Code Cong. & Admin.News at p. 2192). In this case, the surveillance lasted only seven days.

[5] *Doolittle* also sets up a third prerequisite to its application: the defendant must receive an inventory of the surveillance conducted prior to the trial. Though some dispute exists on this point, we find that the district court was not clearly erroneous in concluding that Kilgore did receive the inventory in time.

Since we find that the three premises upon which our *Doolittle* holding was based were all satisfied here, the district court was correct in ruling that the evidence from the Green tap could come in against Kilgore despite the fact that Kilgore was not named in the application. Under the circumstances, a separate evidentiary hearing on the prior surveillances involving Kilgore was not necessary.[7]

Except as modified herein, we adhere to our original opinion and deny the petitions for rehearing.

The Petitions for Rehearing are denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are denied.

Denied.

[7]Our finding that these prior taps on Kilgore were irrelevant to the Green application moots the dispute whether Kilgore was a central figure in the Georgia tap or whether he was only peripherally involved, as we found in our first opinion. Had we found prejudice to Kilgore, a hearing would have been necessary in order to decide whether the evidence from the Green tap should have been suppressed. *See* § 2518(10).

We note that the hearing the court did hold was absolutely necessary, given the allegations in Kilgore's motion to suppress. If he had refused to investigate the legality of the Florida application, we would have been forced to remand this case to him for further consideration.